

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BRUCE TURIANSKY, OFFICER OF	:	
CHARLES AND LILLIAN	:	DETERMINATION
BROWN'S HOTEL, INC.	:	DTA NO. 808304
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1987	:	
through November 30, 1987.	:	

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Petitioner, Bruce Turiansky, officer of Charles and Lillian Brown's Hotel, Inc., 135 Day Court, Mahwah, New Jersey 07430, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1987 through November 30, 1987.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 27, 1992 at 11:00 A.M., with all briefs to be submitted by November 27, 1992. The Division of Tax Appeals received petitioner's brief on October 1, 1992 and the Division of Taxation submitted its letter in lieu of a brief on November 5, 1992. No reply was thereafter submitted by petitioner. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether petitioner Bruce Turiansky is liable for the sales and use taxes due on behalf of Charles and Lillian Brown's Hotel, Inc. ("Brown'sHotel") as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

The Division of Taxation ("Division") issued two notices of determination and demands

for payment of sales and use taxes due dated August 10, 1988. The first notice (Notice No. S880810728L) was for the period June 1, 1987 through August 31, 1987 assessing a total tax due of \$125,730.71, plus penalty and interest. The second notice (Notice No. S880810729L) covered the period September 1, 1987 through November 30, 1987 and assessed total tax due of \$119,208.95, plus penalty and interest. Both notices contained the following explanation:

"The tax assessed above has been estimated in accordance with the provisions of Section 1138(a)(1) of the Tax Law . . . . You are liable individually and as officer of (Charles & Lillian Brown's Hotel, Inc.) under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Law."

The corporation timely filed its sales and use tax return for the period June 1, 1987 through August 31, 1987 without the remittance of tax due as shown on the return of \$134,834.07. Between the time that the return was filed and the date of the issuance of the notice of determination, petitioner made payments toward the tax liability for the period ended August 31, 1987. The amount that remains due on Notice No. S880810728L as agreed between the parties is \$125,693.78.

The corporation late filed its sales and use tax return for the period September 1, 1987 through November 30, 1987 without the remittance of \$119,208.95. This amount appears on the second notice and remains due. The Division submitted into evidence computer printouts from its accounts receivable system which were extracted from the system on November 14, 1991 and such documents confirm the amounts referenced above as due from Brown's Hotel and Mr. Turiansky.

During the period in issue, Brown's Hotel operated as a resort hotel making certain sales of tangible personal property and services subject to tax. Charles and Lillian Brown (husband and wife) were involved in the hotel business for many years and until Mr. Brown's death in 1978 they owned 100% of the stock of the corporation. After Mr. Brown's death, under a merger agreement worked out with the estate attorney, Mrs. Brown began gifting small shares of stock to Mr. Turiansky, his siblings and other family members. However, petitioner testified that Mrs. Brown was extremely reluctant to divest herself of any control and, as a result, the

plan for the disbursement of stock was separated into gifts of voting and non-voting stock. Petitioner owned approximately 15% of the stock, most of which was non-voting, during the period in issue.

Brown's Hotel was a seasonal operation which ceased business in early November and reopened after the winter months, generally during April. Petitioner testified that the hotel had been in financial trouble for many years and began running out of financing sources. Bernard Lipsky, an accountant who preceded David Jaffe as the hotel's advisor, suggested that the only way the hotel could rebuild confidence from the business community, especially banks, was to make it appear as though the hotel was taking on a new direction. Mr. Lipsky convinced Lillian Brown, who was then 82 years old, to step down from the office of president and appoint Bruce Turiansky as president to create an impression that Brown's Hotel had acquired new blood and a new direction. Petitioner testified to Mrs. Brown's reaction:

"Very, very reluctantly she agreed to do that, and let us know the change was in name only; she was the boss of the hotel, owner of the stock." (Tr., p. 37.)

After a week of discussion, Mrs. Brown agreed so long as she could retain her office, and more importantly, provided she lost no actual control and would not have to rely upon or consult with petitioner to make any decisions on behalf of the business.

Petitioner became president of Brown's Hotel in the beginning of 1986, having been in its employ for 18 years working his way into management. He had been involved with working out a payment arrangement with the Division for taxes due for quarters previous to those in issue and numerous pieces of correspondence were introduced into evidence indicating such efforts by petitioner in his role as president. He indicated that he and Mrs. Brown were looking to traditional as well as non-traditional financing sources. Petitioner was of the opinion that one important element missing from Brown's Hotel was an effective general manager. Although petitioner had pursued his education in the field of hotel management at Cornell University, his only experience in hotel management was Brown's Hotel and he was convinced that an operation the size of Brown's with a nightclub and food operations needed a more formal management structure. Although Mrs. Brown objected strenuously to petitioner's suggestion,

one morning during the winter of 1986 she abruptly announced to petitioner that she had found the "perfect general manager" (Tr., p. 65). Mrs. Brown had hired Bernard Lipsky, the hotel's accountant, to assume the position. When Mr. Lipsky accepted, he sold his accounting practice to David Jaffe, an accountant with whom Mr. Lipsky had been partners in prior years. As part of a natural transition, Mr. Jaffe assumed the role as the hotel's accountant. After several months it became apparent that Mr. Lipsky was not suited to the position and Mrs. Brown requested that petitioner handle his firing.

Petitioner testified that during the sales tax periods in question he was aware that the business finances were somewhat scarce. David Jaffe presented petitioner with the sales tax returns in question and checks for petitioner's signature with the assurance that sufficient funds existed for the payment of the taxes and that they would in fact be paid. Petitioner recalled signing more than one check to make such tax payments. Subsequently, Mr. Jaffe convinced Mrs. Brown (without Mr. Turiansky's knowledge and clearly without his approval) that it would be wiser to delay paying the sales taxes currently due and told her he would take care of the matter at a later date. A check in the amount of \$134,834.07 dated September 19, 1987 was submitted with the tax return for the quarter ended August 31, 1987. It was signed by petitioner who intended the payment of sales taxes due, and sent with the tax return. Before the check cleared, Mr. Jaffe persuaded Mrs. Brown to otherwise apply the funds. When the check was presented, the account was found to have insufficient funds. Petitioner was not made aware of such facts until several weeks later.

At the same time the owners of Brown's Hotel were seeking financing sources, they were attempting to negotiate the sale of the hotel with Mr. Carlinski, the owner of another area hotel, the Tamarack Lodge. Sometime later, petitioner found out that Mr. Jaffe (who was also doing the accounting work for Mr. Carlinski at the Tamarack Lodge) had been persuaded to give Mr. Carlinski privileged information about the business operations of Brown's Hotel which he acquired through the bookkeeper. Before Brown's Hotel ceased business operations, the bookkeeper left Brown's and secured employment with Mr. Carlinski. Ultimately negotiations

with Mr. Carlinski faded and a sale was never consummated.

The Division introduced into evidence correspondence dated March 16, 1987 from David Jaffe to the Division (Tax Compliance) which proffered a payment schedule addressing assessments of sales and use taxes due for periods which precede those in issue. In such correspondence Mr. Jaffe stated: "Last year Mrs. Lillian Brown promoted her grandson, Bruce Turiansky, to the presidency of the corporation, however, he did not start to exercise his control of the corporation until several weeks ago." No additional information was provided with regard to the purported changing role of petitioner.

The Administrative Law Judge questioned petitioner about the substance of his role in the hotel during the pertinent time frame. He stated that he maintained a "general manager" status, being held responsible for daily operations, with Mrs. Brown handling the long-range planning. He believed himself to have no control over the course the hotel was to follow. However, any uncomfortable situations which required attention, such as dealing with taxing authorities, financing sources or employees that were no longer furthering the hotel's business (regardless of whether Mrs. Brown hired them), Mrs. Brown delegated to petitioner with directives. Petitioner testified that she was "a very domineering autocratic boss who ran everything. She lived on the grounds of the hotel; she worked seven days a week, 12, 14 hours a day, and that continued when she was in her '80s" (Tr., p. 50).

Petitioner hired few positions since the department heads handled most of their own hiring, and he periodically would be asked to fire persons in relatively minor positions, until the general manager incident. He was not involved in the preparation of payroll and had little input toward asset purchases for the hotel. His compensation was slightly over \$60,000.00 in 1987 and although he was not provided lodging at the hotel, he often received meals free of charge.

Ultimately Brown's Hotel was forced to file for bankruptcy during mid-1988, and a foreclosure sale occurred toward the end of that year.

Petitioner submitted the affidavit of Lillian Brown who was unable to appear at the hearing due to her advanced age and recent hospitalization. Her statement, in pertinent part

reproduced below, confirmed the testimony of Mr. Turiansky with respect to the events leading up to the nonpayment of the taxes in issue:

"I understand that the matter being discussed is the fact that we did not pay our sales taxes during part of 1987. This was a particularly difficult time for me and our business. Although I cannot remember specific dates, I do know that sometime during that summer, at a point when the taxes were due, I was convinced at the last minute not to pay them and to use the money to calm down certain vendors who were threatening to stop delivering.

"Mr. David Jaffe, our accountant at that time, came to me with the tax forms and checks in his hands and said that although Bruce had signed them and they were ready to go, it made more sense to use the money elsewhere. He said that the money could be used to help us with a number of vendors and that we could make other arrangements to pay out the tax later on . . . .

"There were two checks made out for the taxes since we did not have enough money in any one account. I told Jaffe that I thought we should at least send in the smaller one and he said he would, although he disagreed with me. Before this check cleared the bank, the money was transferred elsewhere. I don't remember these circumstances exactly, but I believe that Jaffe arranged it to make matters even worse.

"I knew that Mr. Turiansky was adamant about paying the taxes, but Mr. Jaffe seemed to make good sense so I instructed him to do as he suggested. Mr. Turiansky was quite upset when he found out. We had words about this a number of times. Unfortunately, there was nothing we could [sic] by now because the money was already spent.

"Unfortunately, when the next taxes were due, pretty much the same thing happened again. Mr. Turiansky signed the return and the check and insisted that they be mailed out. Mr. Jaffe got ahold of them before they left the hotel and came to me. This time he said that insurance was due, in fact about to be cancelled, as well as other things, and since we were already negotiating with the sales tax people, we could include this additional tax as part of our negotiations. He also said that since we were close to closing a deal to bring in partners, we could take care of this payment then.

"I wanted to ask Mr. Turiansky for his opinion, but Jaffe convinced me not to, that it would only start another fight. I agreed, very reluctantly, to let Mr. Jaffe do what he thought best. Since he was an accountant, I figured that he knew what was best in matters of this sort.

"Not long after these events, we learned that Mr. Jaffe and our bookkeeper, Peggy Lang, were actually working on behalf of Hy Carlinsky, owner of the Tamarack Lodge and one of the people who were negotiating to become partners with us. From conversations that were overheard in our office by other employees of ours, we found out that Jaffe and Peggy were trying to make things as difficult as possible for us so that Carlinsky and his people would have an easier time with us. Even later on, I heard pretty much the same thing from someone inside the Tamarack.

"Shortly after our negotiations with Mr. Carlinsky ended and we made a deal to

bring other people in as partners, Peggy quit and went to work for Mr. Carlinsky, where she is still working."

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts he did not have the ability to affect the outcome of decisions as to whether the sales taxes in question would be paid. He maintains that although he held the title of president and had some management authority, he lacked the requisite control that would elevate him to the status of a "responsible officer."

The Division asserts that the evidence fully supports a conclusion that petitioner had sufficient authority, knowledge of and control over the corporation's affairs to be held liable for unpaid sales taxes as a responsible officer.

#### CONCLUSIONS OF LAW

A. Whether a person is a "responsible officer" under the Tax Law is determined by Tax Law §§ 1131(1) and 1133(a). Tax Law § 1133(a) provides that every person required to collect tax imposed by Article 28 shall be personally liable for the tax imposed, collected or required to be collected under said article. Tax Law § 1131(1) defines "persons required to collect tax" as every vendor of tangible personal property or services including any officer or employee of a corporation who as such officer or employee is under a duty to act for such corporation. Therefore, the critical question presented in this case is whether petitioner was an officer of Brown's Hotel who was "under a duty to act for such corporation".

Case law makes clear that the mere holding of a corporate office does not, in and of itself, impose tax liability on a person (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Rather, whether a person is a "responsible officer" required to collect sales and use taxes is a factual determination (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448; Chevlowe v. Koerner, *supra*, 407 NYS2d at 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, confirmed 162 AD2d 890, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal,

November 23, 1988). This factual determination, according to the Division's regulations, generally depends upon whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). The Tax Appeals Tribunal's review of the relevant case law in the Matter of Taylor (Tax Appeals Tribunal, October 24, 1991) suggests consideration of the following indicia of responsibility in a "responsible officer" determination: status as an officer, director, or stockholder (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d at 565); the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536); day-to-day responsibilities, involvement with and knowledge of the financial affairs and management of the corporation, as well as the individual's duties and functions set forth in the certificate of incorporation and bylaws (Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d at 865); ability to hire and fire employees (Chevlowe v. Koerner, supra, 407 NYS2d at 429); and authorization to sign the corporate tax returns and checks (Matter of Cohen v. State Tax Commn., supra; Chevlowe v. Koerner, supra, 407 NYS2d at 429). The Supreme Court in Chevlowe also addressed the concept of the responsible person from another viewpoint:

"The courts have defined the 'person' responsible for the payment of tax as that individual who 'had the final word as to what bills should or should not be paid, and when.' (Citation omitted.) The teaching of the cases is that 'a responsible person' is one who has or shares 'final word' as to what bills or creditors should or should not be paid, the word 'final' meaning significant rather than exclusive control." (Citation omitted.) (Chevlowe v. Koerner, supra, 407 NYS2d at 430.)

B. The evidence in this matter supports the conclusion that petitioner did not have sufficient authority and control over the corporation's affairs to be held a responsible officer, liable for the sales and use taxes in issue.

Petitioner's appointment as president of the hotel was for the purpose of "business appearances" and Mrs. Brown reluctantly allowed Mr. Turiansky to handle any matters that naturally flowed from keeping up an impression of new blood or a new corporate direction. In fact, matters that Mr. Turiansky attempted to handle were sabotaged by Mrs. Brown and her advisors.



Petitioner was not the sole officer and owned a small percentage of stock, much of which was non-voting. His compensation, though generous, was in keeping with industry standards. The benefit of low-cost or no-cost meals from a restaurant establishment is not exclusively provided to "responsible persons" under the Tax Law.

Petitioner was not in fact involved with the management of the financial affairs of the corporation. His education and training in hotel management gave him skills to operate the hotel's daily service functions (dining room, entertainment, and lodging) from a management perspective. He did not have control over corporate funds, nor was he in charge of the bookkeeper. She took orders from Mrs. Brown's advisor. Petitioner was only presented with checks to sign as a convenience to his aged grandmother. In fact, petitioner was required to perform tasks as directed by his grandmother, especially when she found a situation uncomfortable or distasteful. It was several weeks before petitioner was made aware that checks he signed intending to pay sales tax were returned due to insufficient funds.

Petitioner did sign the sales tax returns for the periods in issue and one of the checks submitted in payment thereof. He did represent the hotel in its dealings with the Division. He entered into negotiations with business associates in an attempt to save a failing business. The Division is accurate in its statement that absent the production of corporate by-laws it cannot be presumed that the corporation's "president" was a powerless figurehead without duties and responsibilities. However, the credible, compelling testimony of Mr. Turiansky critically necessary to bridge this gap was provided in great detail. It is interesting to note that Mr. Jaffe (in correspondence to the Division dated March 16, 1987) attempted to place petitioner "in control" at a date much later than his appointment as president and corresponding to no other event or relinquishment by Mrs. Brown.

C. The Tax Appeals Tribunal has expressed very clearly that it rejects the narrow viewpoint of finding officer liability by "simply matching the traditional indicia of responsibility to petitioner's surface acts" (Matter of Taylor, *supra*; *see*, Chevlowe v. Koerner, *supra*; Matter of Constantino, *supra*). The Tribunal's analysis of the duties performed by an

alleged responsible officer considers whether the acts were ministerial rather than evidence of actual authority (Matter of Taylor, supra). This was not a situation where Bruce Turiansky declined to exercise his authority or neglected to do so; rather, he was prevented from having any real authority to exercise. Although it is true that Bruce Turiansky held corporate office and represented the corporation as its president in certain circumstances, his actions were primarily done under the supervision and control of Mrs. Brown and her advisors, particularly David Jaffe. It is clear, therefore, that petitioner, Bruce Turiansky did not have the requisite responsibility for management decisions nor did he have control over the financial affairs of Brown's Hotel so as to conclude he had the duty to act on behalf of the hotel in complying with the requirements of Article 28 of the Tax Law.

D. The petition of Bruce Turiansky, as officer of Charles and Lillian Brown's Hotel, Inc., is granted and the notices of determination and demands for payment of sales and use taxes due issued to petitioner dated August 10, 1988 are hereby cancelled.

DATED: Troy, New York  
April 29, 1993

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE